IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.39 OF 2004

Meherban Ali Rehemat Ilahai .. Appellant

Versus

1.Mehadi Hasan Abdul Gafur Shaikh

and Ors. .. Respondents

Mr.K.K.Malpathak for appellant

Mr.S.M.Oak for respondent nos.1 to 6.

CORAM : P.V.KAKADE, J.

DATE : 20TH JUNE, 2005.

P.C.:

1. The appellant has preferred this appeal against the judgment and order passed by the Additional District Judge, Thane dated 30.10.2003 allowing the appeal and setting aside the judgment and order passed by Civil Judge, Junior Division, Thane dated 18.11.2002 decreeing

the suit of the plaintiff.

2. I have heard the learned counsel for both the parties. Perused the record including the compilation filed by the appellant.

3. The plaintiff had filed the suit for declaration and possession of the suit property as well as to obtain declaration that the documents relied upon by the other side in respect of the suit property were fabricated documents. The trial judge after hearing both the parties and recording the evidence decreed the suit holding that the plaintiff had established his title to the suit property It was further held that the defendants were causing nuisance to the plaintiff and on that ground the plaintiff was held entitled for possession of the suit property. While recording this findings it was also held that the defendants' document pertaining to the property were fabricated and no right, title or interest on that basis was accrued by the defendants.

4. The appeal was carried to the Additional District Court, Thane. The Addl. Dist.Judge heard both

the sides and allowed the appeal dismissing the plaintiff's suit holding that the plaintiff had proved that he was owner of the property. It was not established that the plaintiff had started running hotel in the suit premises. It was also held that the plaintiff had failed to prove alleged nuisance from the defendants and was held that the plaintiff was not entitled to the reliefs claimed and on such and other grounds the appeal came to be dismissed. Hence the present appeal.

5. In the course of hearing of the present appeal I have gone through the entire judgements of both the courts below vis-a-vis available documentary evidence on record, which is made available by way of compilation for the purpose of appreciation of the submissions.

. The learned counsel for the appellant brought to my notice the contents of the judgment of the lower court including the points formulated for recording findings and it was submitted on the basis that the lower appellate court judge had totally traversed on the point of crux of the dispute involved in the matter and had not properly appreciated the entire evidence on

record. This contention was challenged on behalf of the respondent on whose behalf it was submitted that the learned lower appellate court judge had rightly appreciated the evidence and recorded his findings on the basis of available record.

6. At the outset it may be noted that the very points raised by the lower appellate court judge are seen to be totally against the basic principles of relevant law in the sense that the entire burden to prove the issues involved is put on the appellants-defendants in negative manner, which cannot allowed by law. Apart from this aspect, perusal of the judgment of the lower appellate court also shows that the evidence, which was on record is not at all appreciated in the light of the findings recorded by the learned trial judge but has totally traversed on some different footing without referring to the issues involved in the matter pertaining to the dispute at hand. The evidence is also not considered regarding the alleged fabrication of the documents, which was also issue involved.

7. At this juncture it must be noted that the Apex

Court in the case of **Madhukar & Ors. vs. Sangram & ors**. reported in **2001(4) SCC 756** has categorically observed that the court of first appeal must record its findings only after dealing all issues of law as well as fact and with the evidence, oral as well as documentary, led by the parties, the reasons of its findings. If court does not fulfil its obligation the parties would not get true benefit of the first appeal, which is a valuable right on the basis of which the parties have the right to be heard on questions of law as well as of fact. If we take into account this dicta, then it is clear enough that the judgment of the lower appellate court is not upto to the standard in order to show that all the relevant issues regarding facts and law are properly appreciated.

8. In view of this aspect I am inclined to remand the matter to the lower appellate court with direction that the appeal be heard afresh on the basis of available evidence and points to be raised relevant to the dispute and findings be recorded on the basis of proper appreciation of factual as well as legal aspects.

. Hence the judgment and order passed by the lower

appellate court dated 30.10.2003 is hereby set aside. The appeal stands remanded to the Addl. District Judge, Thane. The Addl. District Judge, Thane is hereby directed to hear the appeal afresh in view of the aforesaid directions after giving notice and opportunity to both the sides to be heard again on available evidence on record. The matter shall be adjudicated finally as early as and in any case within six months from the date of this order. Pending the hearing of the appeal at the lower appellate court the parties shall maintain status-quo with regard to the suit property.

. It is clarified that the observations made hereinbefore shall not influence the learned appellate court judge while adjudicating the dispute on merits.

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